No. 14731

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AVALO ALLISON FISHER,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING *EN BANC*

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United States Attorney

HAROLD D. KOFFSKY
Attorney, Department of Justice

BRANDON ALVEY
Attorney, Department of Justice

CLIFTON B. D. BROWN
Attorney, Department of Justice

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
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INDEX

TABLE OF AUTHORITIES
CASES

STATUTES

COURT RULES

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To: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

COMES NOW the Appellee by its attorney, the United States Attorney, and moves this Court to permit a rehearing before the Court *en banc*.

In support thereof, the following is respectfully submitted:

(1) The Court has been granted by statute the power to order re-hearings en banc and "the discretion for its exercise," 28 U.S.C., Sec. 46(c) (1952); Cir. 9, Rule 23; *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 259 (1953). It is a "necessary and useful power" in cases "appropriate for consideration by the full court." *Id.* at 260, 252.

(2) In the case at bar the Court ordered reversal of a judgment of conviction based upon a jury verdict of guilty on the ground that the trial court had erred in excluding certain evidence and in its instructions to the jury. It is submitted that the far-reaching implications arising from the Court's decision with respect to the adequacy of the trial court's instructions to the jury are of such a nature as to warrant consideration by the full Court.

(3) In the opinion of the Court, the trial court's instruction to the jury as to the meaning of the term "membership" was insufficient for the reason that the dictionary definition read to the jury defined "membership" in terms of its synonyms rather than breaking it down into its component elements (p. 12, Slip Opinion).

It is respectfully submitted that the court has misconceived the true character of the trial court's instruction. Nowhere in the definition given to the jury

was any synonym for the word "membership" employed, but, on the contrary, the instruction was one which clearly goes to the elements of membership.

The court's charge to the jury afforded a definite standard of guilt and did not render the statute vague and indefinite. Appellant's contention that the word "member" is not sufficiently clear for the jury to have determined his status as a member of the Communist Party is without substance. The word "member" is a word of common knowledge and when related to an organization imputes its own definite meaning. The trial judge informed the jury with specificity as to what their findings would have to be in order to convict appellant of Counts I, III and V of the indictment (R. 849-851), stating as to Count I that they must find that the appellant was a member of the Communist Party as of June 29, 1951; that the statement that he was not then a member of the Communist Party was false, and that appellant used the document containing that statement knowing it to be false and knowing that he was in fact at that time a member of the Communist Party (R. 850). The jury was instructed that the essential elements of Counts III and V were the same, except as to the dates in question. (R. 851).

Membership in an organization is one of the most

commonplace and frequently exercised privileges of today's American citizens. It cannot be reasonably argued that the mentality of members of the jury is such that they are unable to understand the meaning of the word. Nor can it be said that the word "member" is such that each juror must have applied a different subjective test in ascertaining its meaning. Common sense impels the conclusion that each member of the jury applied the established meaning in his deliberation.

In the case of *United States v. Lattimore* (C.A. D.C.) 215 F. 2d, 847, the Court of Appeals held that the word "Communist" has a generic meaning, stating at p. 853:

> " * * * It may be true that the word 'Communist' may be used with different shades, gradations or variations of meaning, but all such are within a clearly established generic meaning. The word is not without a meaning which can be used with mutual understanding by a questioner and an answerer."

Surely if the word "Communist" standing alone is not vague, it cannot be said that the more definitive phrase "member of the Communist Party" would have been subject to a divergence of interpretation by the jury.

When Congress enacted the Labor Management Relations Act, 1947, it did not undertake to define

the term "membership." This is an indication that in the minds of Congress the term "member" was of a sufficiently clear meaning and needed no statutory definition.

The word "member" in usage of contemporary society is such a basic concept that it requires and has no special legal connotation.

The crucial question in this case is whether the instruction was such as to provide a sufficient basis upon which the jury could make a determination whether appellant signed the non-Communist affidavit knowing it to be false. The issue in this case is the knowledge by the appellant that he has falsely denied membership in and affiliation with the Communist Party. The sole question, therefore, is whether the accused was *aware* that he was a member of, or affiliated with the Communist Party, *American Communications Association v. Douds*, 339 U.S. 382, 412-413 (1950), and proof of his membership is not dependent upon a showing of his "support, or even demonstrated knowledge" of the Party's principles. *Galvan v. Press*[1] 347 U.S. 522, 528.

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[1] The crux of the Supreme Court's decision in *Galvan v. Press*, supra, was the showing that an alien held membership in the Communist Party "aware that he was [a member of] an organization known as the the Communist Party which operates as a distinct and active political organization, and that he [was such] of his own free will * * *" 347 U.S. 522, 528.

The test in determining the adequacy of the instructions as to "membership" is not whether the jury was given a hard and fast list of "criteria"[2] against which to measure the existence of membership *vel non* but rather it is whether the trial court properly instructed the jury that they must find that the accused was *knowingly* a member of the Communist Party and that he *knowingly* and *wilfully* lied about his membership. Since the instructions in the case at bar adequately covered these essential elements of the crime charged, it is immaterial that they did not call the jury's attention to various indicia which must necessarily vary from case to case depending upon the evidence.[3]

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[2] Nor is application of the usual tests of attendance at meetings and payment of dues appropriate in the circumstances of this case when, as Judge Denman has observed in commenting on the sufficiency of the evidence, the government has shown that in the period between 1950 and 1952 "the Communist Party policy was that labor leaders subject to such affidavits could destroy Party cards and neither attend meetings nor pay dues." (p. 14, Slip Opinion)

[3] Nor was appellant entitled under any circumstances to have the jury instructed as to the matters which are not in evidence in this case. *Battle v. United States*, 209 U.S. 36, 38 (1908); *Bird v. United States*, 187 U.S. 118, 132. Hence the contention that appellant "might honestly state he was not a member [of the Communist Party] if he had failed to comply with any of the Party's formal requirements for

To attempt to apply a rigid "checkoff list" with unvarying mathematical regularity to each and every case involving proof of membership would result in confusing the jury and unduly emphasizing some portions of the evidence at the expense of others. As the Supreme Court observed in *Perovich v. United States*, 205 U.S. 86 (1907), where an exception was taken to the court's refusal to charge the jury in a murder case that the fact that the victim had not been seen after a certain date did not create a presumption of his death:

> " * * * Singling out a single matter and emphasizing it by special instruction as often tends to mislead as to guide a jury. Doubtless the isolated fact that Jaconi had not been seen would not of itself establish the fact of his death. It is only a circumstance which, taken in connection with the other facts in the case, tends to prove the death. It is merely one link in a long chain, and the court is seldom called upon by special instructions to

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membership as stated in its constitution" (p. 12, Slip Opinion) is without merit. Appellant failed to offer any evidence as to the constitution of the Communist Party or the existence of formal requirements for membership in the Party. At the close of the trial, in making his record of exceptions to the Court's refusal to charge as requested, appellant's counsel expressly omitted those portions of his requested instructions which were based on the Communist Party constitution, stating at the time that the constitution had not been introduced in evidence (R. 869).

> single out any single link in a chain, and affirm either its strength or weakness." [Citing 144 U.S. 408, 433 and 163 U.S. 280, 288].

The principal distinction between the instruction on membership in the case at bar and those upheld on appeal in *Hupman v. United States* (C.A. 6), 219 F. 2d 243, Cert. den. 349 U.S. 953, and *Jencks v. United States* (C.A. 5) 226 F. 2d 540 (Cert. grant. Mar. 5, 1956), is that the court in this case did not tell the jury that in considering whether or not the defendant was a member of the Communist Party they *may* consider certain specified indicia of membership. In the *Hupman* case, the following six indicia were mentioned: (1) whether or not the accused attended Communist Party meetings; (2) whether or not he paid money to the Communist Party; (3) whether or not he took instruction from Communist Party leaders or officers; (4) whether or not he took part in the dissemination or distribution of Communist literature; (5) whether or not he engaged in other conduct consistent with membership in the Communist Party; and (6) all other evidence, either direct or circumstantial, which may bear upon the question of whether or not he was a member of the Communist Party. (Quoted in *Jencks*, Gov. 5th Cr. Br. 74).

In the *Jencks* case the criteria mentioned in the court's instruction to the jury on membership were

(1) whether or not the defendant attended Communist Party meetings; (2) whether or not he held an office in the Communist Party; (3) whether or not he engaged in other conduct consistent only with membership in the Communist Party; and (4) all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the Communist Party on the date of his affidavit. *(Jencks* R. 1061).

Disregarding the last two items in both of these instructions as affording merely broad general guides to the jury in its consideration of all the evidence as distinguished from specific indicia of membership, it appears that the only criterion common to the instructions given in both the *Jencks* and *Hupman* cases is that of attendance at Communist Party meetings. To hold that it is necessary that a jury of normal and average intelligence be told specifically that it may take into consideration whether or not the accused attended meetings of the Communist Party in determining whether or not he was a member of that Party would be to make an idle and formalistic ritual of the court's instructions to the jury. That such an instruction would be wholly superfluous in the instant case is obvious in the light of the evidence that appellant not only attended closed Communist Party meetings but also distributed Communist Party literature,

collected Communist Party dues, asked the witness Mores what the Party policy was with respect to non-Communist affidavits and later carried out the duties of a Communist Party district organizer.[4]

Moreover, it should be noted that the enumeration by a trial court of any specific indicia which might be considered by a jury in determining whether or not an accused was a member of the Communist Party, might well be more prejudicial than helpful to a defendant since it would directly invite the jury's attention to circumstances which the Court regards as being of the greatest probative value.

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[4] It should be noted that when appellant made his record of exceptions to the charge as given, as well as the refusal to grant his requested instructions, he failed to assign as one of the grounds the fact that the jury was not provided with certain indicia of membership as was done in the *Jencks* and *Hupman* cases. He therefore failed to protect his record on this point as required by Rule 30 of the Federal Rules of Criminal Procedure and the overwhelming weight of authority in this circuit. *Bateman v. United States*, 212 F. 2d 61, 70 (Cir. 9, 1954); *Benatar v. United States*, 209 F. 2d 734, 743, 744 (Cir. 9, 1954); *Herzog v. United States*, 226 F. 2d 561, 567-570 (Cir. 9, 1955); *Mitchell v. United States*, 213 F. 2d 951, 957 (Cir. 9, 1954); *Kobey v. United States*, 208 F. 2d 583, 588, 597, 598 (Cir. 9, 1953); *Zamloch v. United States*, 193 F. 2d 889, 891-892 (Cir. 9, 1952); *Ziegler v. United States*, 174 F. 2d 439, 447-448 (Cir. 9, 1949 — Cert. den. 338 U.S. 822, 1949).

(4) The arguments set forth supra with regard to the trial court's instructions on membership apply equally to the instruction given the jury as to the meaning of the term "affiliation." As before, the test is whether the jury was provided with a sufficient basis for applying the subjective test of falsity, to-wit, that appellant signed the affidavit knowing it to be false.

The only material difference between the instruction on affiliation in the case at bar and the instructions on affiliation in *United States v. Hupman* and *United States v. Jencks* is that in those cases the juries were charged that: "Affiliation, as used in sub-section (h) of section 159, Title 29 of the U. S. Code, means something less than membership, but more than sympathy * * *" This instruction was omitted here. While this additional refinement of the definition of affiliation appears to have merit, especially when considered as an isolated segment without regard to the charge in its entirety, it is respectfully submitted that it is superfluous and unnecessary inasmuch as the only requirement as a matter of law is that the jury be given clear instructions. It is submitted that the cases of *United States v. Reimer* and *Bridges v. Wixon*, cited by the Court in its Opinion, are not applicable. Those cases involved a statute which dealt generally with

affiliation with organizations advocating overthrow without identifying any particular organization. In the case at bar the statute and indictment specifically name the Communist Party so that knowledge of the Party's aims and purposes is immaterial.

In defining the term "affiliation" for the jury in the case at bar, the trial court gave a reasonable measure or standard by which to determine the defendant's guilt or innocence. The jury was instructed that they must find that appellant connected or associated himself with the Communist Party, that he adopted or brought himself into close connection with the Communist Party, that he had allied himself with the Communist Party. These are clear, unambiguous matters which the jury could and did understand. A showing that appellant was thus affiliated with the Communist Party knowingly and of his own free will meets all requirements under the *Douds* and *Galvan* cases.[5]

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[5] The arguments presented by the Government with respect to membership and affiliation are not at variance with the decisions of this circuit applying dictionary definitions for the purpose of ascertaining the meaning of words of common usage: *U. S. v Schulze*, 253 F. 377, 379-380 (D.C., S.D. Cal., S.D., 1918) ("Support," "favor"); *Schulze v. U. S.*, 259 F. 189, 190 (Cir. 9, 1919) ("Support," "favor," "oppose"), *Wolck v. Weedin*, 58 F. 2d 928, 930 (Cir. 9, 1932) ("affiliation"); *Branch v. Cahill*, 88 F. 2d

(5) In holding that the trial court erred in overruling appellant's motion for the production of the receipts signed by the witness Mores for payments made to him by the Federal Bureau of Investigation during the period of his services as a confidential informant between 1942 and May 1953, the court took the position that the jury was entitled to know whether Mores lied when he stated that these payments were for reimbursement of expenses only and did not include any compensation for his services.

Appellant demanded the production of the F.B.I. receipts on the theory that Mores' testimony was inconsistent and contradictory as to the *amount* of the monies paid him as a confidential informant for the Federal Bureau of Investigation between 1942 and 1953 (R. 329) and also on the theory that they *might* contradict the witness's testimony that the payments were for expenses only (R. 332).

Later in the trial, government counsel represent-

545, 546 (Cir. 9, 1937) ("affiliated"). In like manner the Supreme Court held that ordinary words used in a resolution delineating the jurisdiction of a Congressional committee must be construed in their "commonly accepted sense." *U. S. v. Rumely*, 345 U.S. 41, 47 ("lobbying activities"). And in *Casey v. U. S.*, 191 F. 2d 1, 4 (Cir. 9, 1951) where the jury was given no definition of the term "radio station," this Court held: "Radio stations are in such common use that no definition was needed."

ed to the court that he had been advised by the Federal Bureau of Investigation that Mores had been paid a total of $10,530 up to May 21, 1953 (R. 365). Defense counsel refused to stipulate that this was the amount paid on the ground that he did not know how much had been paid, having had no opportunity to examine the receipts. Counsel at this point asserted a legal right to examine the receipts *or at least the right to have a tabulation of the sums paid* (R. 366). (Italics supplied)

Thereafter, appellant shifted his ground by taking the extreme position that he would demand the production of each and every receipt indicating a payment to Mores during the period of his activities as an informant for the Federal Bureau of Investigation (R. 367). The trial court ruled that it would be sufficient if the Government supplied a certificate of the payments, holding that appellant was entitled to ascertain the total compensation received by Mores because this was material to the issue of his credibility on the ground of interest. The court stated that the only material question for this purpose was as to the total amount which Mores had been paid, and that the court would not be justified in requiring the disclosure of confidential records of the Federal Bureau of Investigation solely for the purpose of determining this amount (R. 367-369).

The Government subsequently produced a certificate setting forth the payments and this document was marked for identification as Government's Exhibit No. 10 and appellant moved its admission. (R. 748). The certificate was admitted without objection by the Government and appellant thereupon renewed his motion for production and examination of the receipts, which motion the court denied. (R. 749).

Apart from defense counsel's wholesale accusations that Government witnesses were paid to testify, the record contains no reference to any payments to Mores, let alone evidence of such payments, subsequent to those which he had been receiving currently during the period of his services as a confidential informant. The indictment in this case was not returned until June 24, 1954, more than a year after Mores had ceased his activities as a confidential informant. Hence, there is absolutely no basis for any claim or suggestion that Mores was paid anything for his testimony in this case other than the usual and proper witness fees. Nor did appellant's counsel make any attempt during extended cross-examination lasting from four to five hours to lay a foundation for an attack on Mores credibility on the ground that he was being paid for his testimony. No questions were asked of the witness to ascertain whether or not he had received payments from the Government for any purpose

whatsoever subsequent to those made contemporaneously with his activities as a confidential informant. Hence, the record as it stands is completely devoid of any basis for challenging Mores' credibility on the ground of interest based on the supposition that he was being paid for his testimony in this case.

With all due deference, it is respectfully submitted that regardless of the connotation placed on the term expenses by the witness or any other party to the proceeding, the Court's position with respect to the trial court's refusal to order production of the receipts is not well taken. Moreover, it would appear that the Court has given undue weight to the magnitude of the total payments without considering the fact that they continued over a period of 11 years so that the average monthly payments during that time did not amount to more than $75 per month. Obviously, any compensation received by the witness would have included his disbursements for gasoline, dues, contributions, Party literature and other expenses.

In any event, no foundation was laid for impeachment on the ground that Mores was being paid anything at the time of his testimony at the trial of this case or at any time subsequent to May 1953 or that he was in any way financially interested at the time of the trial. All of the evidence in this case re-

lating to moneys which Mores received from the Federal Bureau of Investigation had to do with past payments in connection with his activities more than 18 months prior to the trial for which no further moneys were due him. It can hardly be supposed that Mores and his wife were seeking evidence in 1943 to support a prosecution of appellant in 1954 arising from a statute which was not enacted until 1947.

Any justification for the theory that the receipts should have been admitted in evidence must necessarily rest upon a showing of their relevance and materiality to the issues of this case. Their materiality, if any, was confined solely to the issue of Mores' credibility. Viewed in this light, it becomes apparent how tenuous is appellant's theory, accepted by the Court, that the receipts were material. For it is obvious that the only way in which they can be linked with the issues in this case would be by showing that the amount and character of the moneys received by Mores as an informant for the F.B.I. had some bearing on the question of his interest as a witness more than a year and a half after he ceased to be an informant. The record does not contain a scintilla of evidence to indicate that Mores had any personal interest in the outcome of this case and no rational consideration of the evidence leaves room for the absurd hypothesis that Mores was engaged by the Government specifically to spy on Fisher as an

individual.[6] Hence, it can be seen that the "connection" between these payments and the issues before the trial court was indirect and remote in the extreme.

Inasmuch as appellant in the instant case failed to lay the necessary foundation for his demand by showing that the receipts signed by Mores would be contradictory of his present testimony and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried, viz: the participation of the accused in the crime, it is obvious that the attempt to secure production of the F.B.I. receipts for the purpose of determining "the method, mode and extent of payment" (R. 333-334) was what the Supreme Court characterized in *Gordon v. United States*, 344 U.S. 414, as a

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[6] The record shows clearly that Mores had been engaged in observing and reporting upon Communist Party activities and personalities generally, and the fact that certain activities of appellant were included was merely incidental to the performance of these duties. Cf. *Jencks v. United States*, 226 F. 2d 540, 553, where the Court of Appeals for the Fifth Circuit observed: "* * * Appellant dwells upon his accusation that these informers were 'involved in despicably dirty business of informing for pay; and takes the prosecution to task for its reliance upon the testimony of such witnesses. The answer to that argument is, of course, that the Government has nothing to do with selecting the witnesses. The witnesses against appellant were determined when appellant chose those with whom he would fraternize."

blind fishing expedition. Indeed, appellant himself admitted this to be the case when he conceded that he did not know whether the receipts would contradict the witness, but merely hoped that something impeaching might turn up.

The rule laid down in the *Gordon* case was quoted with approval by this Court in *Herzog v. United States*, 226 F. 2d, 561, (Cir. 9, 1955) holding that no foundation was laid for a demand for the production of a transcript of the testimony of certain Government witnesses before a grand jury. The Court distinguished the numerous cases cited by the appellant in that case stating at page 566:

> "Other than the *Alper* case, the cases cited by appellant all deal with statements given by a witness to Government agents rather than testimony before a grand jury. None of the cases suggests that grand jury testimony or statements in Government reports should be turned over to the defendant to inspect for possible impeachment material without some prior showing that statements contradictory to the witness's testimony at trial are contained therein."

Another Government witness in the *Herzog* case testified that the defendant requested him to make payments for used cars purchased from the defendant partly by check and partly in cash, inasmuch as the defendant was going to show only a portion of his selling price on his invoices. On cross-examination this

witness was asked if he himself had been in difficulties with the O.P.A. at the time in question. He replied in the negative. Subsequently, the defendant proffered in evidence for purposes of impeachment an entry in the witness's books showing a disbursement for attorneys' fees in connection with a threatened O.P.A. suit. In holding that the trial court properly excluded this evidence. this Court commented as follows:

> "* * * The trial court's ruling was correct. McNeil's O.P.A. difficulties, if any, were not an issue in this case. The purpose of evidence is to prove or disprove some issue in the cause on trial. If proffered evidence does not tend to do either of these things, it has no place in the trial and is either immaterial or collateral to the inquiry. A witness cannot be impeached where the subject matter of his testimony is either immaterial or collateral to the issues in the cause in which the testimony is given. *Arine v. United States*, 9 Cir., 10 F. 2d 778; *Shanahan v. Southern Pacific Co.*, 9 Cir., 188 F. 2d 564." 226 F. 2d 561, 565.

(6) This Court held that the trial court erred in not allowing appellant to cross-examine the witness Harper concerning proceedings before a Security Board in which Harper had previously appeared as a witness (p. 8, Slip Opinion, R. 522). It is respectfully submitted, however, that the trial court properly refused to permit appellant to cross-examine Harper relative to his testimony in a collateral matter. Appellant represented to the trial court that on two occa-

sions during the hearings in question Harper had mistakenly identified other persons as being the individual whose case was being heard. Appellant further asserted that Harper had subsequently failed to identify the correct individual (R. 518-521).

In its opinion, this Court noted that the Government relied upon the rule in *Shanahan v. Southern Pacific Co.*, 188 F. 2d 564 (Cir. 9, 1951) that a witness cannot be impeached by an inconsistent statement on a collateral matter. Nevertheless, for the reasons stated below, the Court concluded that the trial court's exclusion of this evidence was error:

> "However, appellant's theory was that Harper had been presented to the jury as an 'expert' on Communism, Communist activity and on identification of Communists. He wanted to challenge Harper's expert standing and show bias in that Harper was paid to produce his testimony. Harper's testimony placing appellant at a closed meeting of the Communist Party in 1949 was a critical part of the Government's case.[7] Great latitude in cross-examination should be allowed. We hold the court erred in refusing it. See *United*

[7] Although proof of appellant's attendance at a closed meeting of the Communist Party in 1949 undoubtedly contributed to the strength of the Government's case, Harper's testimony in this regard was merely cumulative. As the court indicated in holding the evidence sufficient to sustain the verdict, Mores also testified that appellant attended this meeting. (p. 14, Slip Opinion).

States v. Augustine, 189 F. 2d 587, 590-591[8] (Cir. 3, 1951)." (p. 8, Slip Opinion).

It is respectfully submitted that while Harper may have been presented to the jury as an expert on Communist Party policy, he definitely was *not* presented or qualified as an expert on the identification of individuals. The trial court so ruled and appellant himself expressly conceded the point during the following colloquy at page 489 of the record:

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[8] In *United States v. Augustine*, *supra*, cited in the Court's opinion, the Court of Appeals for the Third Circuit upheld a ruling limiting the scope of cross-examination of one government witness, but reversed on the ground that the court had unduly restricted the cross-examination of another witness. In the first instance the appellate court found that there had been no abuse in the exercise of the trial court's broad discretion in setting limits upon the extent of cross-examination as to the issue of credibility. As to the second witness, the court held "with reluctance" that further cross-examination should have been permitted because the testimony of this individual, who was called as a rebuttal witness by the prosecution, tended strongly to discredit the testimony given by the accused in his defense. The trial court refused to permit inquiry into matters material to the credibility of the witness although the facts stated in the opinion strongly suggested the possibility of a direct financial motive for falsehood in the witness's testimony bearing on the main issue in the case. 189 F. 2d 587, 590-591. The factual situation insofar as the second witness was concerned is therefore distinguishable from the case at bar.

"MR. ETTER: It is my understanding he has been qualified as an expert.

THE COURT: *Not as an expert in identification.* (Italics supplied).

MR. ETTER: No, no; that is right. As I gather your Honor's ruling, the objection will be be sustained, however?

THE COURT: Yes; however you can make your record."

The theory that Harper became clothed with the mantle of an "expert" as to *all* matters about which he testfied was concocted by appellant at the trial in the effort to justify his attempted inquiry into a wholly collateral matter. This was in reality merely an attempt to impeach Harper's credibility under the guise of an attack on his "qualifications" as an "expert witness." (R. 488-489). As already noted, the court rejected this spurious argument and appellant himself conceded its invalidity. (R. 489).

For the foregoing reasons it is respectfully suggested that the court's discretion would most appropriately be exercised by the order for the rehearing *en banc.*

Inasmuch as the Supreme Court has seen fit to grant a petition for a writ of certiorari to review the judgment of the Court of Appeals for the 5th Circuit in *Jencks v. United States*, 226 F. 2d 540 and 226 F.

2d 553 (Cir. 5, 1955), involving issues somewhat analogous to those presented in the case at bar, it is respectfully suggested that if the court is not disposed to grant this petition for a rehearing, the court may wish, nevertheless, to withhold its decision on the petition pending the illumination of the issues by the Supreme Court in the *Jencks* case.

CHARLES P. MORIARTY
United States Attorney

HAROLD D. KOFFSKY
Attorney, Department of Justice

BRANDON ALVEY
Attorney, Department of Justice

CLINTON B. D. BROWN
Attorney, Department of Justice

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

CHARLES P. MORIARTY
United States Attorney